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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. _____

LAKE CHARLES STEVEDORES, INC., and
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

LINCOLN RICHARD,
Respondent.

ALSO

LAKE CHARLES STEVEDORES, INC., and
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

FRED SULLIVAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARGUMENT.

In order for petitioners to prevail herein portions of the Louisiana Workmen's Compensation Statute must be declared unconstitutional. By its terms, that statute affords a remedy to respondents. We quote:

West's La. Rev. St. 23:1035:

"The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

"The operation, construction, repairs, removal, maintenance and demolition of . . . vessels, boats, and other water crafts. . . . Rigging or coaling of vessels, or loading or unloading of cargoes of vessels. . . ."

Petitioners contend that the state statute may at times constitutionally apply to repairers of vessels for example but not, under otherwise indistinguishable circumstances, to those who load or unload vessels. The employment of the one is more maritime in nature than the other, they say. Suppose that an explosion occurs aboard a vessel moored to a Lake Charles dock killing an employee engaged in unloading cargo and another (neither being a member of the crew) engaged in repairing a hole in the hull. The dependents of each seek the state remedy. If petitioners are correct, that portion of the section of the state statute referring to repairs of vessels would be held constitutional, that portion referring to loading and unloading, unconstitutional. And for such a result petitioners rely upon Section 2 of Article 3 of the Constitution of the United States extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Before there were cargoes to load or unload, ship crews repaired their vessels. The repair and upkeep of

vessels is "more" maritime, more essential and closely related to navigation—to "admiralty"—than is the loading and unloading of those vessels.

We turn to the Longshoremen and Harbor Worker's Compensation Act. We observe, first, that the **only** time the terms "longshoremen" and "harbor workers" are used in the Act is in the first section thereof, reading: "This chapter may be cited as the Longshoremen's and Harbor Workers' Compensation Act." The third section of the Act, Title 33 of U.S.C.A., sec. 903, is unequivocably expressive of congressional intent apropos applicability of state workmen's compensation laws wherever constitutionally permissible, reading, in part:

> "Sec. 903 **Coverage.** (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) **and** IF RECOVERY FOR THE DISABILITY OR DEATH THROUGH WORKMEN'S COMPENSATION PROCEEDINGS MAY NOT BE VALIDLY PROVIDED BY STATE LAW. . . ." (Emphasis added).

Extensive argument in support of respondents' position herein would be superfluous in view of the admirably and concisely reasoned opinion of Judge Tate of the Louisiana Court of Appeal, First Circuit, in the Lincoln Richard case (R. 32 to 40). We rest our case upon that opinion.

The authorities upon which we rely are:

Davis v. Dept. of Labor, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1942);

Bethlehem Steel Co. v. Moore, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 417 (1948), affirming *Moore's* case, 323 Mass. 162, 80 N. E. 2d 478 (1948);

Baskin v. Industrial Accident Commission, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523 (1949), reversing 89 Cal. App. 2d 632, 201 P. 2d 549 (1949);

Kaiser Company, Inc., v. Baskin, 340 U. S. 886, 71 S. Ct. 208, 95 L. Ed. 643 (1950), affirming 97 Cal. App. 2d 257, 217 P. 2d 733 (1950).

Other authorities, also pertinent, include:

Behrle v. London Guarantee & Acc. Co., Ltd., 68 A. 2d 63 (R. I.) certiorari denied, 339 U. S. 928, 70 S. Ct. 627, 94 L. Ed. 1349 (1950);

Allisot v. Federal Shipbuilding & Drydock Co., 73 A. 2d 153 (N. J. 1950);

Dunleavy v. Tietjen & Lang Dry Docks, 85 A. 2d 343 (1951);

Commissioner of Tax & Finance v. Oceanic Serv. Corp., 276 App. Div. 725, 97 N.Y.S. 2d 401 (1950);

Eldredge v. Weidler, 274 App. Div. 138, 81 N. Y. S. 2d 58 (1948);

Maryland Cas. Co. v. Toups, 172 F. 2d 542 (5th Cir. 1949), certiorari denied, 336 U. S. 967, 69 S. Ct. 937, 93 L. Ed. 1118 (1949).

As stated by Judge Drewen in the *Dunleavy* decision, at 85 A. 2d 351: "The ruling opinion in the Davis case leaves no doubt that if the federal jurisdiction had had first cognizance of the claim and proceeded to final award, it would have been upheld."

We turn now to the cases cited by petitioners. Foremost among these are *Minnie v. Port Huron Terminal Company*, 55 S. Ct. 884, 295 U. S. 647 (decided in 1935) and *T. Smith & Son v. Taylor*, 276 U. S. 179, 48 S. Ct. 228 (decided in 1928).

So far as the theoretic premise espoused by petitioners is concerned, we readily concede that it is supported by those and other cases of comparable or earlier vintage. Even so, it does not follow that those cases—even if there were no others—warrant the granting of a writ of certiorari in the instant situation.

However, the essence and core of our position is that the holdings in *Davis*, *Moore* and *Baskin* represent a radical departure from the older decisions, and require in the instant matter a result different from that reached in those older cases. Petitioners say no. **Therein lies the simple crux of the issue between petitioners and respondents.**

Incidentally, in their petition for a writ, petitioners fail even to mention (except where the citation appears in a quotation from another case) the decision in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086. The reason would appear to be that this particular decision, *eo nomine*, has been largely discredited. But it is the full re-adoption of the *Jensen* doctrine that petitioners implicitly urge.

We do not feel that a review here of the facts in *Davis*, *Moore* and *Baskin* is indicated. In each the employee was injured or killed while performing work in the course of his maritime employment on board a vessel afloat in navigable waters. All lived on shore and may be described as waterfront employees.

Petitioners say that an alchemy results if a worker is a longshoreman—as opposed to a harbor worker. Extensive citations of cases defining those terms are contained in *West's Words and Phrases*.

Petitioners, perforcedly, at least, point to the general language of the United States Constitution as rendering this matter an "open daylight" situation clearly requiring a reversal of the Louisiana courts. What then of the provision of the Longshoremen and Harbor Worker's Compensation Act excluding from the coverage thereof injury or death to "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." It was in compliance with petitioners' urgent desire that it was stipulated that the vessels upon which respondents were injured exceeded eighteen tons. In *Eldredge v. Weidler*, 81 N. Y. S. 2d 58, 274 App. Div. 138 (1948) recovery was sought under the New York Workmen's Compensation Act for the death of an employee accidentally drowned. It was held a sufficient reason to allow recovery that no showing had been made that the vessel to be served by the deceased exceeded eighteen tons. Congress might have decided upon any other tonnage. Is a fundamental earth-shaking principle involved if recovery by an injured waterfront employee depends upon whether he was injured on a vessel of seventeen rather than of nineteen tons?

If petitioners' position were upheld it would mean that upon the filing of a suit for workmen's compensation by a longshoreman or harbor worker for injuries sustained on a vessel, the trial court would first be required to determine whether he could successfully urge a claim under the Longshoremen and Harbor Worker's Compensation Act. If the court were of opinion that the worker could recover under the federal act, his suit would be dismissed. If the court were uncertain on that score, the suit would be entertained. If the waterfront worker alleged that he was a harbor worker, he would be "in court", but not if he alleged that he was a longshoreman.

The trial court's determination of that issue (possibility of success under the federal act) would have to be based upon an examination of the petition seeking workmen's compensation, without the benefit of evidentiary facts. It usually would not know whether the worker had ever been on a ship prior to the accident, the type of the vessel, whether it had motive power, was a ship under construction or a commissioned ship under repair, was engaged in commerce, was moored or secured to a dock or to land and, if so, how, and so on. The worker's petition seeking workmen's compensation might factually allege that he had been sent on board a vessel to unload it, but sustained injuries after being pressed into service to assist in making emergency repairs to the vessel. Or the situation might be that he was injured after having completed one type of activity but before having actually begun a different type to which he had been assigned.

Petitioners say that the rule of *Minnie* and *Jensen* is and should be good law "in clear cases". What they do not seem to realize is that the *sine qua non* of that rule is

the requirement that a determination be made of what is clear in situations in which clarity does not exist. To apply it in a "clear" case means that in innumerable instances of injury to waterfront workers involving inextricably interwoven elements both "of the land" and "of the sea" the trier of fact will be faced with the impossible task of deciding upon which side of the mystical line each individual case falls. That was the Gordian knot severed by *Davis*.

But in any event, the present matter **IS** no "clearer", to say the least, than the fact situations presented in *Davis*, *Moore*, and *Baskin*. Plainly, the choice of the state remedy made by respondents must be sanctioned.

The granting of a writ in these cases would constitute a long backward step. The ills of *Jensen* would be raised from the unmourned dead. The spawning of more of their ilk would follow.

CONCLUSION.

We submit that the petition for certiorari in these cases should be refused.

Respectfully submitted,

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CERTIFICATE.

I certify that a copy of the foregoing brief has been delivered to John A. Hickman, Esq., 506 Weber Building, Lake Charles, Louisiana, counsel for petitioners, Lake Charles Stevedores, Inc., and The Travelers Insurance Company.

s RUSSELL T. TRITICO

RUSSELL T. TRITICO,
Counsel for Respondents.